TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 788. 348 77.

THE UNITED STATES, APPELLANT,

vs.

FRANK B. CROSTHWAITE.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 31, 1895.

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1 In the Court of Claims.

FRANK B. CROSTHWAITE
vs.
THE UNITED STATES. } No. 18389.

I.—*Petition.—Filed May 3, 1894.*

Your petitioner, Frank B. Crosthwaite, respectfully shows to the court—

1. That he is a citizen of the United States, residing in the city of Washington, in the District of Columbia, and has always yielded true allegiance to the United States.

2. That on the 1st day of March, 1889, he was appointed a special examiner in the Department of Justice, at an annual salary of $2,500.00, which position he held until the 30th day of June, 1893, and that he drew the salary of said office for said period.

3. That on the 13th day of August, 1892, he was duly appointed a special assistant to the attorney of the United States for the district of Idaho, to aid him in the preparation and prosecution of all criminal business properly coming before the court during its special term at Coeur d'Alene, Idaho, for August 23, 1892. A copy of his said ap-
2 pointment is filed herewith and made part hereof, marked Exhibit A.

4. That he duly qualified in, entered upon, and discharged the duties of said office, and assisted the Hon. Freemont Wood, U. S. attorney for said district, at Coeur d'Alene, at said term of the United States court, in the preparation and prosecution of all criminal business which came before that court at said term.

5. That his just and reasonable compensation for his services rendered in that behalf is one thousand dollars; which sum is due to him and remains wholly unpaid; and the petitioner says that he is sole owner of said claim, never having assigned the same or any part thereof to any person or persons.

Wherefore the petitioner demands judgment against the defendant for one thousand dollars, and all proper relief in the premises.

(Signed) FRANK B. CROSTHWAITE,
Petitioner.

(Signed) CHANEY & RANNELLS,
His Attorneys.

DISTRICT OF COLUMBIA,
County and City of Washington, ss:

Before me, William J. Rannells, a notary public in and for said District, appeared Frank B. Crosthwaite, who, being duly sworn, upon his oath, says, that the material allegations set out in the foregoing petition are true in substance and in fact.

(Signed) FRANK B. CROSTHWAITE,
Petitioner.

Subscribed and sworn to before me this 2nd day of May, 1894.

(Signed) WILLIAM J. RANNELLS,
Notary Public.

EXHIBIT A.

DEPARTMENT OF JUSTICE,
Washington, D. C., August 13, 1892.

SIR: You are hereby appointed a special assistant to the attorney of the United States for the district of Idaho, to aid him in the preparation and prosecution of all criminal business properly coming before the court during its special term, ordered at Coeur d'Alene, for August 23, 1892.

Your compensation will be determined by the Attorney-General upon completion of your service.

Execute the customary oath of office and forward the same to this Department without delay.

Respectfully,
(Signed) CHARLES H. ALDRICH,
Acting Attorney-General.

FRANK B. CROSTHWAITE, Esq.
(Through Freemont Wood, U. S. attorney, Boise City, Idaho.)

3 II.—*Traverse.—Filed April 3, 1895.*

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

J. E. DODGE,
Assistant Attorney-General.

4 III.—*Findings of fact and conclusion of law.—Filed April 22, 1895.*

This case having been heard by the Court of Claims, the court, upon the evidence, finds the facts as follows:

I.

During the year 1892 the claimant was an examiner in the Department of Justice duly appointed by the Attorney-General. On the 22d June, 1892, he received from the Attorney-General the following order:

"You are directed to discontinue your investigations in Utah and proceed at once to Idaho and confer with the author of the communication [referring to a confidential communication at the same time transmitted by the Attorney-General] and make a thorough examination of all matters that may be brought to your attention or that you may be able to find out in any way relating to the marshal. In addition to the above, while in Idaho you will make an examination of the offices and accounts of the United States attorney, the United States marshal, the clerk of the United

States court, and the United States commissioners. You will make the usual investigation as to the manner in which the business is conducted, inform yourself as to the character and qualifications of the various officials, and report the results of your examination to this Department."

II.

While thus engaged in Idaho the claimant received the following order by telegraph, with which he complied:

DEPARTMENT OF JUSTICE,
Washington, D. C., August 9, 1892.

F. B. CROSTHWAITE,
Examiner, Department Justice, Boise City, Idaho.
(Care U. S. Attorney.)

Report to and assist the United States attorney at a special term to be called by Judge Beaty at Coeur d'Alene City, Idaho.

ALDRICH,
Acting Attorney-General.

III.

On the 13th August, 1892, the claimant was appointed special assistant to the attorney of the United States for the district of Idaho. The appointment was in the following terms:

DEPARTMENT OF JUSTICE,
Washington, D. C., August 13, 1892.

FRANK B. CROSTHWAITE, Esq.,
Boise City, Idaho.
(Through Fremont Wood, U. S. Attorney.)

SIR: You are hereby appointed a special assistant to the attorney of the United States for the district of Idaho, to aid him in the preparation and prosecution of all criminal business properly coming before the court during its special term, ordered at Coeur d'Alene for August 3rd, 1892.

Your compensation will be determined by the Attorney-General upon completion of your service.

Execute the customary oath of office and forward the same to this Department without delay.

Respectfully,

CHARLES H. ALDRICH,
Acting Attorney-General.

IV.

The claimant took the oath of office as prescribed by the appointment and performed the duties assigned to him thereunder. He appeared on behalf of the United States before the U. S. commissioner at Wallace, Idaho, for the purpose of having him discharge a large number of the rioters who had been held to appear for examination, and he examined a large number of witnesses before the grand jury, and he rendered daily attendance and assistance at the trial of the cases, and generally rendered the

professional assistance of an assistant district attorney from the 23d August, 1892, to the 28th September, 1892. He also performed and discharged his duties of examiner.

V.

At the time of rendering the service above described as special assistant district attorney, the claimant was receiving from the United States as examiner in the Department of Justice a salary of $2,500 per annum. He was also reimbursed for his traveling expenses during the period he acted as assistant district attorney.

VI.

On the 14th August, 1892, while at Boise City, Idaho, and after his appointment as special assistant district attorney had been made, but before it had been received by him, the claimant mailed to the Attorney-General an official letter in relation to the criminal proceedings then being instituted in Idaho against rioters and conspirators, in which he said:

"I will proceed to Wallace to-morrow for the purpose of preparing the cases for trial, and to select the necessary witnesses, in order that none may be subpœnaed unnecessarily. The marshal has been instructed to provide a sufficient guard for the term to be held, and everything appears to be moving along smoothly.

"In order that no question may be raised by the defense as to my status, and that I may be able to appear before the grand jury, I beg to suggest the advisability of my appointment as a special assistant to the United States attorney, without compensation, for these cases."

VII.

The court finds that the value of the claimant's services as special assistant district attorney for the period from the 23d August to the 28th September, 1892, was $300.

VIII.

Before suit brought, the Attorney-General refused to fix the compensation of the claimant for his services as assistant district attorney hereinbefore set forth, and has refused to allow him any compensation whatever.

6 The claimant's application for compensation and the refusal of the Attorney-General are in the words following:

COEUR D'ALENE, IDAHO, *Sept. 29th, 1892.*

The ATTORNEY-GENERAL,
Washington, D. C.

SIR: I have the honor to hand to you herewith a statement of services rendered as special assistant United States atty. for the district of Idaho.

I send this statement to you, considering that it is necessary, if it shall be determined that I shall be compensated for the services performed as asst. U. S. atty. I have left the amount to be inserted at the Department in accordance with your action thereon.

Very respectfully,

FRANK B. CROSTHWAITE.

The United States to Frank B. Crosthwaite, Dr.

To services as special assistant United States attorney for the district of Idaho, for and during the special term of the United States district court held at Coeur d'Alene City from August 23d to September 28th, inclusive, 1892, 37 days, at per diem.

Appointment dated Aug. 13th, 1892.

I hereby certify that I have performed the services charged for and that I have received no pay for the same.

F. B. CROSTHWAITE.

I certify that F. B. Crosthwaite has performed the service on the days specified in the foregoing account.

JAS. H. BEATTY,
Judge U. S. Dist. Court, Dist. of Idaho.

COEUR D'ALENE, IDAHO, *Sept. 29th, 1892.*

4948—1892.] DEPARTMENT OF JUSTICE,
Washington, D. C., October 7, 1892.

F. B. CROSTHWAITE,
Examiner, Department of Justice, Cheyenne, Wyoming.

SIR: Yours of the 29th ultimo relating to your request to be allowed compensation for services as special assistant United States attorney in the Idaho cases is received, together with your account for the same. Also letters from Judge Beatty and United States Attorney Wood concerning it.

No such claim can or will be allowed by me. I am surprised that you should have made such a demand. You certainly did not exercise your usual sense of propriety in this matter, especially in consulting with officers whom you were sent out to examine about a claim of your own so unfounded. You were there especially for the purpose of curtailing expenses in all directions, and such a claim as you submit was, to say the least, a very poor example to others.

As an examiner of this Department you receive $2,500 a year and expenses, and what you have been doing is clearly within the line of your duty in the premises.

Very respectfully,

W. H. H. MILLER, *Attorney-General.*

CONCLUSION OF LAW.

And upon the foregoing findings of fact a majority of the court decides as a conclusion of law—

The claimant should recover the value of his services as assistant district attorney, to wit, $300.

7 IV.—*Claimant's motion to amend finding No. 7 and order overruling same.*

Comes now the complainant by his attorneys herein and moves the court to add to finding No. 7, as handed down by the court in said case April 22, 1895, the following:

The court further finds that if the estimate of the value of the claimant's services herein as fixed by the claimant's witnesses be accepted, that

the claimant's services herein should be reasonably worth one thousand dollars (1,000).

Respectfully submitted.

JOHN C. CHANEY.

Filed May 10, 1895.

Overruled by the court May 13, 1895.

WILLIAM A. RICHARDSON,
Chief Justice.

8 V.—*Opinion of the court.*

NOTT, J., delivered the opinion of the court:

The Government, as defendants in this case, can not say that when they commissioned the claimant and sent him into the grand jury room at Coeur d'Alene he was an assistant district attorney, and that when he came to them for compensation he was not an assistant district attorney. If he was not then an assistant district attorney he had no right to go into the grand jury room and assist in the finding of indictments, and the Government had no right to send him. If he was an assistant district attorney, the service which he rendered in the grand jury room was service as such, and the question in the case is whether he is precluded from recovering compensation by reason of his holding another office and receiving the salary attached to it by law.

It is contended by the counsel for the defendants that the services of the claimant as special examiner in the Department of Justice and as assistant district attorney were not "distinct and different."

The statute authorizing and defining the duties of special examiners is as follows:

"For the detection and prosecution of crimes against the United States, preliminary to indictment; for the investigations of official acts, records, and accounts of officers of courts, including the investigation of the accounts of marshals, attorneys, clerks of the United States courts, and the United States commissioners, under the direction of the Attorney-General, and for this purpose all the records and dockets of these officers, without exception, shall be examined by his agents at any time, thirty-five thousand dollars." (Sundry civil appropriation act, August 5, 1892.)

The statute authorizing the employment of assistant district attorneys is as follows:

"The Attorney-General shall, whenever in his opinion the public interests requires it, employ and retain, in the name of the United States, such attorneys and counsellors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant attorneys and counsel the amount of compensation, and shall have supervision of their conduct and proceedings. (Sec. 363, R. S. U. S.)

"Every attorney or counsellor who is specially retained, under the authority of the Department of Justice, to assist in the trial of any case in which the Government is interested shall receive a commission from the head of such Department, as a special assistant to the Attorney-General, or to some one of the district attorneys, as the nature of the appointment may require, and shall take the oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon them by law." (Sec. 366, R. S. U. S.)

Upon the face of these statutes the duties do appear to be distinct and different. It appears that the claimant had been sent to the West to assist in working up the cases in which he afterwards took part as assistant district attorney. But conceding this, it does not follow that the services were not distinct and different. A surgeon may be employed at an annual salary to edit a medical journal. During his period of service his employer may employ him to perform a surgical operation. Both the editing of the journal and the performance of the operation will require a knowledge of surgery; yet no one would contend that the two are not distinct and different. So the hunting up of witnesses, the examining of accounts, and other work of an examiner differ from the professional work of going into a grand jury room and examining 175 witnesses. The latter duty involves responsibility, preparation, professional skill, and nervous strain distinct and different from those of a lawyer's clerk or a detective or a special examiner.

It has been regarded as settled since the decision of the Supreme Court in United States v. Saunders (120 U. S. R., 126) that a person may hold two offices and receive the salaries of both, notwithstanding the provisions of the Revised Statutes, secs. 1763, 1764, 1765, provided that they
9 are distinct, each having its own duties and compensation, and are not incompatible. In this case we have seen that the offices are distinct and that each has its own duties and compensations. The resulting question is whether they are incompatible.

Two offices are incompatible when a performance of the duties of the one will prevent or conflict with a performance of the duties of the other, as in Webster's Case (28 C. Cls. R., 25), where the offices were those of engineer in the Navy and paymaster; and as in Winchell's Case (ib., 30), where the offices were that of engineer in the Navy and that of draftsman in the Hydrographic Office; or when the holding of the two offices is contrary to the policy of the law, as in Badeau v. The United States (130 U. S. R., 439), where the one office was that of a retired army officer and the other one in the consular service. In this case the duties were not incompatible. Both required the claimant to be at the same place; and it appears that the performance did not interfere with or relieve him from the performance of the other.

In this case, as in Bentley's (26 Cls. R. C., 241), there may be a question whether the claimant can recover until the Attorney-General has fixed the amount of his compensation. That point was raised, but was not decided, the case going off for other reasons. Here the claimant was ordered by telegram to proceed to a certain place. He did so, and there found an appointment from the Attorney-General as special assistant to the attorney of the United States for the district of Idaho to aid him in the preparation and prosecution of all criminal business properly coming before the court during its special term, ordered at Coeur d'Alene for August 23, 1892. The appointment also said, "Your compensation will be determined by the Attorney-General upon completion of your service. Execute the customary oath of office and forward the same to this Department without delay." The claimant complied with these instructions; he took the oath of office and assisted in the preparation and prosecution of the criminal business referred to. It is true that before he had accepted the office he had suggested the advisability of his appointment "as a special assistant to the United States attorney, without compensation, for these

cases." But that letter was not written until after this special appointment of the Attorney-General had been made. It was a proposition not acted upon by either party, and is properly in the case only as it may affect the question of damages.

Another peculiar fact in this case is that the appointment was made by one Attorney-General (Acting Attorney-General Aldrich), and the refusal to allow the claimant compensation came from another (Attorney-General Miller). If the Attorney-General had allowed the claimant some compensation, though small and inadequate, it may be that it would preclude him from seeking more. By accepting the appointment he may be said to have agreed to submit the question of compensation exclusively to the Attorney-General. But he did not agree by accepting the appointment to submit to the arbitrament of the Attorney-General the question whether he was in law entitled or not entitled to any compensation whatever. Does the refusal of the Attorney-General to fix the value of his service and the amount of his compensation leave the claimant free to recover in quantum meruit? In Cooper's Case (8 C. Cls. R., 199) it was held that where a contract provides that a contractor shall be allowed and paid a
10 reasonable price, to be estimated and determined by a board of inspectors appointed by the Quartermaster's Department, and the department neglects to appoint such board, the contractor may bring his action and recover for his work. This case has been frequently recognized since, and rarely, if ever, questioned. It seems clear that if a person is legally entitled to compensation the refusal of a public officer to fix the amount of the compensation should not deprive him of his rights.

In this case, as in Bentley's, the claimant has sought to prove by the depositions of lawyers the value of the services rendered. As in Bentley's Case, we regard their statements as little more than the opinion of witnesses. Furthermore, the opinions are not based upon the actual relations of the parties. Here the preparation of the claimant as counsel was largely acquired by his services as examiner. The value of his services as examiner must be gauged by the salary which he received and accepted, $2,500. His traveling expenses and hotel bills were paid by the United States.

As was said in Bentley's Case, the value of a lawyer's services is a matter of opinion, as to which the court will not be bound by the testimony of witnesses. Basing our conclusion upon all of the facts of the case, the value of the claimant's services as examiner, the relations of the parties, the fact that the claimant offered to perform without compensation, and the nature of the services rendered, we place the compensation at $300.

Three of the four members of the court who sat in the case concur in this opinion.

11 VI.—*Judgment of the court.*

At a Court of Claims held in the city of Washington on the 22d day of April, 1895, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimant and do order, adjudge, and decree that the claimant, Frank B. Crosthwaite, do have and recover of and from the United States the sum of three hundred dollars ($300).

By the Court.

12 VII.—*Application of defendants for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 22d day of April, 1895, in favor of the claimant, the defendants, by their Attorney-General, on the 18th day of June, 1895, make application for and give notice of an appeal to the Supreme Court of the United States.

J. E. DODGE,
Asst. Attorney-General.

Filed June 18th, 1895.

Allowed in open court October 29, 1895.

WILLIAM A. RICHARDSON,
Chief Justice.

13 In the Court of Claims.

FRANK B. CROSTHWAITE }
vs. } No. 18389.
THE UNITED STATES. }

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the judgment of the court, of the application of defendants for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 30th day of October, 1895.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) Case No. 16078. Court of Claims. Term No., 788. The United States, appellant, vs. Frank B. Crosthwaite. Filed October 31st, 1895.